

D.T.E. 98-27-B

Joint Petition of Eastern Enterprises and Essex County Gas Company for approval of a merger by the Department of Telecommunications and Energy, pursuant to G.L. c. 164, § 96. Eastern Enterprises and Essex County Gas Company also seek the Department's approval of a rate plan for Essex County Gas Company, pursuant to G.L. c. 164, § 94.

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FOR: EASTERN ENTERPRISES AND

ESSEX COUNTY GAS COMPANY

Petitioners

-and-

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FOR: EASTERN ENTERPRISES

Petitioner

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THE ALLIANCE OF UTILITY WORKERS' UNIONS

Intervenors

ORDER ON ATTORNEY GENERAL'S MOTIONS FOR CLARIFICATION AND EXTENSION OF THE JUDICIAL APPEAL PERIOD

I. INTRODUCTION

On October 7, 1998, the Attorney General of the Commonwealth ("Attorney General") filed with the Department of Telecommunications and Energy ("Department"): (1) a Motion for Clarification ("Motion") of the Department's Order of September 17, 1998, in Eastern-Essex Acquisition, D.T.E. 98-27 ("Order" or "Eastern-Essex Acquisition"); and (2) a companion motion for Extension of the Judicial Appeal Period of the Order ("Companion Motion").⁽¹⁾

The Attorney General is seeking clarification of (1) whether the Department has determined that the "acquisition premium" is an appropriate regulatory asset and the appropriate amortization period of the cost of the acquisition premium; and (2) whether the premium on Eastern's stock can be used to offset the premium paid to Essex County Gas Company's ("Essex") shareholders (Motion at 3).⁽²⁾ Eastern Enterprises ("Eastern") and Essex (collectively, the "Petitioners") filed a response to the Attorney General's Motion ("Response").

II. POSITIONS OF THE PARTIES

A. The Attorney General

The Attorney General argues that the Department's Order is silent on the accounting treatment of the acquisition premium (Motion at 4). Specifically, the Attorney General seeks clarification of whether the acquisition premium and the associated transaction costs constitute regulatory assets, what amount of these costs will be deferred for future recovery, whether a compensating credit to Essex's common equity balance will be recorded, and the formula for recovery of those costs over the ten-year term of the Rate Plan (id. at 5). The Attorney General argues that if the Department did intend that the acquisition premium not be recorded as a regulatory asset and/or that annual amortization costs remain undefined, then the Department must reconsider this decision based on mistake or inadvertence (id. at 5 n.3)

The Attorney General also maintains that the Department is silent on whether the premium on Eastern's stock should be used to offset the premium paid to Essex's shareholders (id. at 6). The Attorney General contends that if the Department did intend

not to apply this offset, then the Department should reconsider its decision based on mistake or inadvertence (id. at 9 n.4).

B. The Petitioners

The Petitioners assert that the Department's Order is clear and unambiguous in its recognition that under the pooling-of-interests transaction, there would be no accounting adjustment to Essex's books to record merger-related costs (Response at 4). The Petitioners, therefore, argue that the no clarification is warranted with regard to the creation of a regulatory asset (id.).

The Petitioners also argue that the Department explicitly rejected the Attorney General's argument that the premium on Eastern's stock should be used to offset the premium paid to Essex's shareholders and stated that the Attorney General's approach effectively would nullify any reason for Eastern to consummate the merger (id. at 7, citing Order at 63). The Petitioners argue that the Attorney General's arguments constitute a request for reconsideration of a fundamental policy determination in the Order (id. at 7).

III. STANDARDS OF REVIEW

A. Clarification

Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order or when the order contains language that is so ambiguous as to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-35-A at 3 (1992), citing Fitchburg Gas & Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

B. Reconsideration

The Department's Procedural Rule, 220 C.M.R. § 1.11(10), authorizes a party to file a motion for reconsideration within twenty days of service of a final Department Order. The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company,

D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant effect upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

IV. ANALYSIS AND FINDINGS

In response to the Attorney General's Motion for Clarification, we first assess whether the Attorney General has raised any issues that require determination under our standard of review, if the Order was silent as to the disposition of any issues.

With respect to the accounting treatment of the acquisition premium, the Department finds a fundamental flaw in the Attorney General's argument. That is, the Attorney General overlooks the accounting consequences of the Department's approval of a pooling-of-interests transaction to effect the merger. The Order explicitly sets forth that (1) the identified transaction costs, including the acquisition premium, would be incurred by Eastern's shareholders; (2) Eastern's shareholders would be at risk for the recovery of these costs; and (3) the transaction is structured as a pooling-of-interests transaction that does not involve the revaluation of Essex's books for accounting purposes. Eastern-Essex Acquisition at 52, 56, 62, 65, 68. Therefore, the acquisition premium cannot be considered a regulatory asset, and consequently no amortization period applies.⁽³⁾ Accordingly, no clarification of this issue is warranted. With respect to the Attorney General's request for reconsideration of this issue, the Department finds that there is no mistake or inadvertence by the Department, and that the Attorney General merely is attempting to reargue issues already considered and decided in the main case.

Regarding the Attorney General's assertion that the Department failed to address the Attorney General's argument that the premium on Eastern's stock should be used to offset the premium paid to Essex's shareholders in the transaction, the Department both considered and rejected this argument. See Eastern-Essex Acquisition at 63, citing Exh. DJE-1, at 25-26. As a result, no clarification is warranted. The Department further finds that the Attorney General's request for reconsideration of this issue fails to demonstrate any mistake or inadvertence by the Department, and represents an attempt to reargue issues already considered and decided in the main case.

V. ORDER

Accordingly, after due notice and consideration, it is hereby

ORDERED: That the Motion for Clarification of the Department's Order filed by the Attorney General of the Commonwealth on October 27, 1998, be and hereby is denied; and it is

FURTHER ORDERED: That any appeal of the Department's Order in Eastern - Essex Acquisition, D.T.E. 98-27 (1998), must be filed within ten days of the issuance of this Order on the Attorney General's Motion for Clarification.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

1. On October 8, 1998, the Department approved the Attorney General's Companion Motion, extending the appeal period to ten days following the issuance of an order on the Attorney General's Motion for Clarification.

2. The Attorney General seeks, in the alternative, reconsideration of these issues

(Motion at 5 n.3, 9 n.4).

3. The Department found that the total costs to effect the merger, amounting to \$62,099,000, represent a reasonable level for transaction costs, merger integration costs, and the quantification of the acquisition premium. Eastern-Essex Acquisition

at 67-68. In approving the Rate Plan, the Department stated that Eastern would have the opportunity to recover these costs of the merger for its shareholders by seeking to achieve merger-related efficiencies during the ten-year term of the Rate Plan. Id. at 68.